

EX PARTE COMMUNICATIONS

INITIAL STATEMENT OF REASONS

SPECIFIC PURPOSE OF THE PROPOSED REGULATORY CHANGE

The San Francisco Bay Conservation and Development Commission proposes to delete existing Commission Regulation Section 11325 and to adopt new Commission Regulation Sections 10280 through 10287. Existing Commission Regulation Section 11325 establishes the Commission's policy on ex parte communications between Commission members and interested parties and the public in Commission enforcement cases. The Commission also adopted Resolution 24(A) in 1974 and modified it in 1975 to establish a policy on ex parte communications that applies to permit matters. Section 11325 is binding on the Commission because the Commission adopted it as a regulation. The policy contained in Resolution 24(A) as modified is not binding because the Commission never adopted it as a regulation.

In 2001, the Commission considered whether to modify the two policies. After holding a public hearing, the Commission appointed a special committee to consider the various issues that had arisen and to report back with recommendations. The committee met three times and reported back to the Commission. On August 15, 2002, the Commission remanded the matter back to the committee with comments and directions. The committee met three more times and reported its recommendations to the Commission on February 6, 2003. With only three minor changes, the Commission agreed with the recommendations and directed staff to commence formal rulemaking to adopt the proposed policies as regulations.

The rulemaking activity would adopt a specific and detailed policy that applies to ex parte communications in all Commission quasi-judicial activities, including the issuance of permits, the issuance of cease and desist orders, and the issuance of civil penalty orders. Ex parte communications are communications that occur outside of the regular noticed Commission meetings that are open to the public.

NECESSITY

The Commission acts in a quasi-judicial manner when it applies its general policies to a specific set of facts in one or more of its authorized actions. This type of activity includes the issuance of permits, of cease and desist orders, and of civil penalty orders. When it acts in this manner, due process requirements of the federal and state constitutions generally require that the business of a public agency such as the Commission be conducted during its regularly scheduled meetings that are open to the public and subject to public comment and rebuttal and that discussions that do not occur at that time should be disclosed on the record of the agency and the public given an opportunity to respond before the agency reaches a decision on the matter being considered. Moreover, the Commission also believes that it is important to conduct its

business openly and impartially as much as is reasonable. The Commission therefore believes it ought to, as a matter of policy as well as of law, require that the Commission's quasi-judicial business be conducted generally in public at its meetings and that discussions or communications concerning such Commission actions that occur outside of normal Commission meetings should be disclosed in a timely manner and the public allowed to comment and rebut as necessary before the Commission takes any action on the proposal.

However, the Commission also acknowledges that there are some circumstances where prohibiting a communication from occurring outside of the Commission's meetings or requiring the disclosure of such a communication is neither practical or appropriate. Examples of such types of communications include communications between Commission members and Commission staff, communications that are purely procedural in nature, communications that occurred in a properly noticed meeting of another agency that was open to the public, among others listed in proposed Section 10281(b).

TECHNICAL, THEORETICAL, AND EMPIRICAL STUDY, REPORTS, OR DOCUMENTS RELIED UPON

The Commission did not rely on any technical, theoretical, or empirical studies, report, or document in determining the nature or precise text of the proposed regulations. However, the rulemaking file contains a variety of historical and relatively current documents, including

1. memo from E. Clement Shute Jr. to Charles Roberts dated July 2, 1974;
2. Commission minutes of August 1, 1974, page 2;
3. Commission minutes of April 15, 1974, pages 2-3;
4. Commission minutes of September 19, 1974, page 3;
5. Proposed Resolution Regarding Private Contacts dated October 3, 1974;
6. Commission meeting minutes of October 3, 1974, pages 2-4;
7. Commission Resolution No. 24(A);
8. memo from E. Clement Shute Jr. to Charles Roberts dated August 25, 1975;
9. memo from E. Clement Shute Jr. to Commissioners dated September 19, 1975;
10. Commission staff report from Charles Roberts to All Commissioners and Alternates dated September 29, 1975;
11. Commission minutes of October 16, 1975, pages 5-7;
12. Letter from Will Travis to J. Matthew Rodriguez dated March 7, 2001;
13. Letter from Joseph Remcho to Barbara Kaufman dated April 16, 2001;
14. Letter from Will Travis to J. Matthew Rodriguez dated April 27, 2001;
15. Letter from Joseph Barbieri to Will Travis dated November 14, 2001;
16. Commission staff report and recommendation from Will Travis and Jonathan Smith on Ex Parte Communications dated February 8, 2002;
17. Commission Meeting Minutes for February 21, 2002;
18. Commission staff report to Ex Parte Communications Committee Members from Will Travis and Jonathan Smith dated March 8, 2002;

19. Commission staff report to Ex Parte Communications Committee Members from Will Travis and Jonathan Smith dated April 19, 2002;
20. Commission staff report and recommendation to Ex Parte Communications Committee Members from Will Travis and Jonathan Smith dated July 12, 2002;
21. Commission staff report and recommendation to All Commissioners and Alternates from Will Travis and Jonathan Smith dated August 2, 2002;
22. Commission meeting minutes of August 15, 2002, pages 5-14;
23. Commission staff report to Ex Parte Communications Committee Members from Will Travis and Jonathan Smith dated September 20, 2002;
24. Draft Committee report and recommendation to Ex Parte Communications Committee Members from Will Travis and Jonathan Smith dated November 8, 2002;
25. Committee report and recommendation to Commissioners and Alternates from Ex Parte Communications Policy Committee dated January 24, 2003;
26. Commission meeting minutes of February 6, 2003, pages 18-23; and
27. Cal. Public Resources Code Sections 30320 through 30329.
28. BCDC Answers to Typical Questions About Ex Parte Communications, May 2, 2003

REASONABLE ALTERNATIVES AND THE COMMISSION'S REASONS FOR REJECTING THOSE ALTERNATIVES

The Commission considered a wide variety of issues and alternatives when it held committee meetings and considered this matter itself. Those general policy alternatives included: (1) not adopting any regulation and simply relying on California case law; (2) retain the binding policy for enforcement matters and the nonbinding policy for permit matters; or (3) adopt a new policy and make it enforceable as a regulation. The Commission also considered of specific issues and alternatives, including: (1) should the policy require avoidance of an ex parte communication as a primary response or only require the appropriate disclosure of an ex parte communication when one has occurred, (2) how narrow or broad should the policy be, (3) should the policy retain the existing distinction for permit applications between pure policy discussions and communications that involve the application of policy to specific facts of a quasi-judicial matter, (4) should the policy also apply to quasi-legislative matters, such as plan amendments, (5) when should the policy begin to apply, (6) how detailed should the required disclosure be, (7) when should disclosure be required, (8) how should the policy deal with a communication that occurs in a public meeting that has been properly noticed, (9) how should the policy deal with discussions in a social setting, (10) how should the policy deal with email communications, (11) how should the policy deal with an oral communication received by a Commission member after the close of the public hearing or with a written communication received after the close of the period for the receipt of written communications, and (12) how should the policy deal with field trips by individual Commission members? A more detailed discussion and analysis of these issues and the alternatives accepted by the Commission and those rejected by the

Commission is contained in the Report and Recommendation from the Committee on Ex Parte Communications to the Commission dated January 24, 2003.

REASONABLE ALTERNATIVES THAT WOULD LESSEN ANY ADVERSE IMPACT ON SMALL BUSINESS

The Commission believes that the proposed regulatory action would not have any adverse impact on small business and has not identified any reasonable alternative that might lessen any adverse impact on small business.

EVIDENCE SUPPORTING FINDING OF NO SIGNIFICANT ADVERSE ECONOMIC IMPACT ON ANY BUSINESS

The proposed regulatory action would only limit contacts outside of the normal hearing process for quasi-judicial matters that the Commission considers. It would not prohibit them under all circumstances and it would not affect the ability of all interested parties and members of the public from submitting written materials to the Commission as an institution or to all Commission members, thereby ensuring that all Commission members see the material, or from appearing and speaking at Commission public hearings. The proposed policy and regulations deal only with what Commission members can and cannot or should not do with regard to ex parte communications. They would not have any significant adverse impact on any business.